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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION THREE

PALACE EXPLORATION  
COMPANY,

Plaintiff and Appellant,

v.

FRANCHISE TAX BOARD,

Defendant and Respondent.

B284110

Los Angeles County  
Super. Ct. No. BC627385

APPEAL from an order of the Superior Court of Los Angeles County, Randolph M. Hammock, Judge. Dismissed.

Nardiello Law Firm, Chad D. Nardiello; Ferguson Case Orr Paterson, Wendy C. Lascher and John A. Hribar for Plaintiff and Appellant.

Xavier Becerra, Attorney General, Diane S. Shaw, Assistant Attorney General, Brian D. Wesley and Matthew C. Heyn, Deputy Attorneys General, for Defendant and Respondent.

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## **INTRODUCTION**

Palace Exploration Company (Palace) appeals from an order striking its prayer for declaratory relief regarding penalties assessed by the California Franchise Tax Board (FTB) for Palace's alleged promotion of abusive tax shelters. Palace contends the trial court erred by finding that Palace could not obtain declaratory relief as to the unpaid penalties without paying them first. Because we have no jurisdiction to review the trial court's interlocutory order, we dismiss the appeal.

## **FACTS AND PROCEDURAL BACKGROUND**

Palace is an Oklahoma oil and gas exploration company with its principal place of business in New York.<sup>1</sup> In a position letter dated June 13, 2014, FTB notified Palace that FTB had determined that Palace had designed, promoted, and sold to California taxpayers "abusive tax shelters," in the form of oil and gas partnership interests. The position letter stated Palace "knowingly made, or caused to be made, false and/or fraudulent statements" about the tax benefits investors would receive if they participated in the partnerships. Under Revenue and Taxation Code section 19177,<sup>2</sup> the "promoter penalty" for making false or fraudulent statements connected to abusive tax shelters was 50 percent of the gross income derived. Although FTB determined that Palace owed a total promoter penalty of \$10,908,750 for

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<sup>1</sup> We draw the facts from the complaint and documents of which the trial court granted judicial notice.

<sup>2</sup> Unless otherwise indicated, all subsequent statutory references are to the Revenue and Taxation Code.

transactions in the 2005 taxable year, it invited Palace to submit by July 15, 2014, any additional information for FTB's consideration. It is unclear whether Palace availed itself of FTB's invitation.

On June 17, 2015, FTB sent Palace a "Notice of Penalty Due" demanding immediate payment of the \$10,908,750 penalty. The notice stated: "If you make a payment of at least 15 percent of the penalty within 30 days of this demand notice and file a claim for refund, you may also file a court action within 30 days after we deny the claim for refund or the claim is deemed denied, whichever is earlier."

On December 2, 2015, more than five months after the demand notice, Palace "made a representative payment" of \$6,250 for one of the 34 penalties assessed by FTB, less than 0.5 percent of the total penalty. That same date, Palace filed a claim form with FTB, seeking a refund of the \$6,250 and an abatement of the balance of the remaining penalty.

In a letter dated June 17, 2016, FTB denied Palace's claim for refund in the amount of \$6,250. Because the \$6,250 payment was not 15 percent of the total penalty, and Palace did not make payment within 30 days of the penalty notice as required by section 19180, subdivision (c)(1), Palace had not properly contested the penalty. Unless Palace filed an action in superior court within 30 days (on or before July 18, 2016), the determination would become final.

On July 18, 2016, Palace filed in superior court a complaint for refund under section 19382. Palace alleged it never had a physical presence in California, it never engaged in any oil and gas exploration in California, and the partnerships organized by Palace were neither formed under nor subject to California law.

The complaint also alleged a refund was required because Palace did not make false or fraudulent statements; sections 19180 and 19180, subdivision (c) were not lawful bases for denying a refund claim; and section 19177, as applied to Palace, violated the Commerce Clause, the Due Process Clause, and the Eighth Amendment of the United States Constitution. In the prayer for relief, Palace requested a refund of its \$6,250 payment; statutory overpayment interest; “a determination that Palace is not liable for penalties in the amount of \$10,908,750 assessed under RTC § 19177,” or a redetermination of the amount consistent with the federal Constitution and the statute; attorneys’ fees and costs; and such further and additional relief as the court may deem just and proper.

FTB filed a demurrer, arguing that article XIII, section 32 of the California Constitution required Palace to pay the full amount of the tax penalty in advance. Until Palace did so, the trial court did not have jurisdiction over the request for refund, and the complaint failed to allege a cause of action. The partial payment of \$6,250 did not entitle Palace to file the complaint.

The trial court overruled the demurrer, stating that a demurrer may be sustained only when it disposes of the entire cause of action and the court had jurisdiction over the refund claim for the \$6,250 amount paid. The court indicated that a motion to strike would be the proper vehicle for FTB to challenge Palace’s request for relief as to the unpaid penalties.

On January 18, 2017, FTB filed a motion to strike certain portions of the complaint under Code of Civil Procedure sections 435 and 436. Specifically, FTB asked the trial court to strike the following: allegations in paragraph 45 involving any of the 34 transactions identified by FTB in its position letter; all of

paragraph 53 (i.e., allegations concerning penalties imposed against Palace for lawful transactions made by and to Richard Siegal and his family); and the entire third prayer for relief, which requested a determination of Palace's liability for the \$10,908,750 penalty. FTB also filed an answer denying all the allegations not stricken pursuant to its motion to strike, and asserted seven affirmative defenses. In its third affirmative defense, FTB alleges the complaint is barred "in whole or in part, by the Constitution and laws of the State of California, including without limitation" article XIII, section 32 of the California Constitution. Palace filed a response and FTB filed a reply to the motion to strike.

On May 25, 2017, after a hearing, the trial court denied in part and granted in part FTB's motion to strike. Although the court denied the request to strike portions of paragraph 45 and all of paragraph 53, it granted the request to strike the third prayer for relief. In its written ruling, the court concluded that the penalties were divisible. Palace's payment of \$6,250 was sufficient to confer jurisdiction to consider the claim for refund of that single penalty, under article XIII, section 32 of the California Constitution. The court, however, "has no jurisdiction at this time to decide any issues concerning the amounts at issue which have not yet been paid or tendered by [Palace]." The court ordered FTB to answer the complaint as composed following the grant of the motion to strike. The court noted that FTB could seek to limit the scope of the litigation, including discovery, to the \$6,250 penalty "by way of an appropriate motion for protective order and motions in limine."

Palace filed a timely notice of appeal from the order, and the parties stipulated to a stay of court proceedings pending our resolution of this appeal.

## DISCUSSION

“Appellate jurisdiction is derived solely from the Constitution or statutes.” (*Lopes v. Capital Co.* (1961) 192 Cal.App.2d 759, 763.) Accordingly, jurisdiction cannot be conferred upon the appellate court by estoppel, waiver, or the consent or stipulation of the parties. (See *Estate of Hanley* (1943) 23 Cal.2d 120, 123.) An order granting a motion to strike a portion of a pleading under Code of Civil Procedure sections 435 and 436 may not be appealed prior to entry of judgment. (See Code Civ. Proc. §§ 904.1, subd. (a)(1), 472c, subd. (b)(3); see also *Barrett v. Stanislaus County Employees Retirement Assn.* (1987) 189 Cal.App.3d 1593, 1601, fn. 4 [order granting or denying a motion to strike a pleading or a part thereof is nonappealable].)

Here, the parties agree the appeal is from an interlocutory order in an ongoing action and therefore is not appealable under the final judgment rule, but they differ on the grounds for appellate jurisdiction. Palace argues we should assume jurisdiction under the collateral order doctrine. For its part, FTB argues we should treat the appeal as a petition for an extraordinary writ.

“‘When a court renders an interlocutory order collateral to the main issue, dispositive of the rights of the parties in relation to the collateral matter, and directing payment of money or performance of an act, direct appeal may be taken. [Citations.] This constitutes a necessary exception to the one final judgment rule. Such a determination is substantially the same as a final judgment in an independent proceeding.’” (*Hanna v. Mercedes-*

*Benz USA, LLC* (2019) 36 Cal.App.5th 493, 506.) The collateral order doctrine requires that the interlocutory order “ ‘(1) be a final determination (2) of a collateral matter (3) and direct the payment of money or performance of an act.’ ” (*Ibid.*) Here, the order striking a portion of Palace’s complaint, i.e., the third prayer for relief as to unpaid penalties, was not a final determination of Palace’s request for refund. The request for refund as to the paid \$6,250 penalty remains before the trial court.

And we agree with FTB that the prepayment issue is not collateral. A collateral matter is “distinct and severable from the main issues in the proceeding ... .” (*Serrano v. Stefan Merli Plastering Co., Inc.* (2008) 162 Cal.App.4th 1014, 1026.) The issues at the heart of Palace’s appeal are whether it must pay the penalties before challenging them, and whether the penalties were properly imposed on Palace as the alleged promoter of abusive tax shelters. Those issues are not distinct and severable; they are identical to Palace’s claims in its complaint regarding both the single penalty it paid and the 33 remaining penalties it has not paid. The trial court still has before it the prepaid penalty of \$6,250, and its decision regarding whether Palace is due a refund is “essential to a final determination of the parties’ rights ... .” (*City of Carlsbad v. Scholtz* (2016) 1 Cal.App.5th 294, 300.) The collateral order doctrine is also inapplicable here because the order appealed from did not direct the payment of money or performance of an act. (See *Apex LLC v. Korusfood.com* (2013) 222 Cal.App.4th 1010, 1016.)

Although we have discretion to treat Palace’s appeal as a petition for a writ of mandate, “we should not exercise that power except under unusual circumstances.” (*Olson v. Cory* (1983) 35

Cal.3d 390, 401; see also *Wells Properties v. Popkin* (1992) 9 Cal.App.4th 1053, 1055 [petition to treat a nonappealable order as a writ should only be granted under the most extraordinary circumstances].) The order denying in part and granting in part the motion to strike portions of the complaint does not present unusual or extraordinary circumstances. As we explained, the trial court still has before it Palace's request for refund of the prepaid penalty of \$6,250. As such, Palace's ability to conduct discovery and advance its arguments that FTB could not assess penalties on a foreign corporation that never had a physical presence in California, never engaged in any oil and gas exploration in California, and created investment partnerships that conducted business outside of California, will not be affected by our ruling in this purported appeal. Indeed, as Palace acknowledges, "[n]othing decided in this appeal will have any bearing on whether Palace is entitled to a refund with respect to the one penalty that it paid."

A few other points merit discussion. While the trial court struck the third prayer for relief from the complaint, it did not strike allegations in the complaint that FTB "unlawfully denied Palace's refund claim because Palace did not violate [section] 19177 with respect to any of the thirty-four (34) transactions identified" by FTB in its June 13, 2014, position letter. And one of the remaining prayers for relief allows Palace to seek "further and additional relief as the [c]ourt may deem just and proper." Moreover, the challenged order suggests that unless and until FTB obtains a protective order or a ruling on motions in limine—and there is no indication in the record that FTB obtained any such order or ruling—the scope of the litigation and discovery is not limited to issues involving the prepaid penalty of \$6,250. Put



differently, it is not clear from the record that the trial court intended to entirely dispose of the “ ‘pay first, litigate later’ ” issue raised by FTB in its motion to strike or in its third affirmative defense to the complaint.

For these reasons, the order is not appealable, and we decline to treat the appeal as a petition for a writ of mandate.

## **DISPOSITION**

The appeal is dismissed. Each party shall bear its own costs on appeal.

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LAVIN, Acting P.J.

WE CONCUR:

EGERTON, J.

DHANIDINA, J.